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2 Q And let me just state for the record that
3 just before this deposition started Mr. Zimmerman
4 handed to me three documents. The first one is a
5 document stamped confidential, Bates label NW 00801.
6 The next document stamped confidential Bates label
7 NW 00856. And the next document also stamped
8 confidential NW 00863.

9 MR. ZIMMERMAN: I believe that's a
10 multi-page document.

11 MR. SMITH: Yes, it is.

12 Q Through 00866.

13 And Mr. Zimmerman also told me
14 something about the privilege and I want to make
15 sure that he says it on the record so that I don't
16 say it wrong.

17 MR. SMITH: But can you tell me what some
18 of these documents were, because I
19 **appreciated, marked and withheld based upon
20 the attorney/client privilege?

21 MR. ZIMMERMAN: That's correct.

22 I believe all three documents were
23 withheld from the defense production. After
24 reviewing those documents, I determined that
25 document Bates stamped NW 00801 should not be

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2 properly withheld. And with respect to the
3 documents NW 00856 and then NW 00863 through
4 866, defendants are waiving the privilege.

5 Q Mr. Auerbach, I have before you the
6 exhibits that were previously marked 1 through 11.
7 I have them in a binder before you, the originals.

8 Turn, if you would, to Exhibit 1.

9 Exhibit Number 1 was previously
10 marked. It is the Notice of Deposition that is
11 directed to Northwest Company pursuant to Federal
12 Rule of Civile Procedure 30b6.

13 I would like you to turn to item
14 number 5. Do you see where it says, quote, Any
15 contention that the contemplated transaction with
16 SIG would have constituted or created a fraudulent
17 conveyance.

18 Do you see that?

19 A Yes, I do.

20 Q Is Northwest contending in this case that
21 if they would have closed the transaction that there
22 would have been some sort of fraudulent conveyance?

23 A Yes.

24 Q Can you tell me what the factual basis is
25 for that contention?

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2 MR. ZIMMERMAN: Mr. Smith, I believe the
3 witness was still in the process of answering
4 your last question.

5 A What I was going to say was, yes, we felt
6 that there was an absolute certainty that that would
7 be an issue down the road. Not that the transaction
8 itself was a fraudulent transaction, but that the
9 transaction was -- would be deemed -- could be
10 deemed, could be deemed, a fraudulent transaction if
11 there were issues down the road.

12 Q Can you tell me what the factual basis is
13 for Northwest's contention that if the transaction
14 would have closed it could have been deemed a
15 fraudulent conveyance?

16 A The first point of which that this came up
17 was there were conversations in which the idea of a
18 fraudulent transaction, fraudulent conveyance --
19 fraudulent transaction, excuse me, came up in
20 conversations based upon the amount of debt that the
21 company was going to have.

22 And if the company could not support
23 the debt and our creditors would come after us, that
24 the first thing that they would want to do is they
25 would want to come after those who had been enriched

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2 by the transaction. And those who are enriched by
3 the transaction would have been myself and my
4 father. Nobody else would have had any money to go
5 after.

6 We had spoken to our attorneys at
7 Moses & Singer and we had asked them for an opinion.
8 The opinion from Moses & Singer is that this
9 transaction would -- when I say -- I have to use the
10 right words -- not constitute a fraudulent
11 transaction, but could very well be considered a
12 fraudulent transaction.

13 We contacted our attorneys,
14 Silverberg, Goldsmith after we spoke to Moses &
15 Singer. They agreed that the transaction would also
16 be subject to a fraudulent conveyance.

17 After doing that, I believe we spoke
18 to one other attorney, I believe, a friend. I have
19 to check. I apologize. Just indirectly we had
20 asked their opinion and I believe their opinion was
21 the same.

22 After that we contacted Susquehanna
23 and Michael Beer. We directly spoke to Susquehanna
24 about the issue of the fraudulent transaction. It
25 was a suggestion of Susquehanna that they felt that

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2 the transaction while possibly could be a fraudulent
3 transaction, they didn't feel it was a great risk,
4 but that they would speak to their legal team.

5 We were told by Dan Werther that they
6 contacted their legal team --

7 Q Mr. Auerbach --

8 A I am sorry, I don't remember the name of
9 their legal group right now. Anyway, they contacted
10 them and the opinion that came back from their
11 attorneys was that the transaction could be deemed a
12 fraudulent transaction.

13 But Dan Werther stated that they felt
14 it was unlikely that that would happen. We asked
15 Susquehanna if it was highly unlikely that
16 ^^^there/they would be a fraudulent transaction.
17 Would they indemnify us from a fraudulent
18 transaction down the road.

19 They went back to their attorneys or
20 whomever they speak to at Susquehanna and the answer
21 was no. That although it was unlikely, they would
22 not indemnify us.

23 We were advised by Silverberg
24 ^^^Stonehall & Goldsmith and we were advised by
25 Moses & Singer that in lieu of that we would be

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2 liable if anything happened. What we explained to
3 Susquehanna was that, is that everybody said at
4 Susquehanna that it probably wouldn't happen, but in
5 the end if it did happen, the only people who would
6 be brought in would be Ross and Shay. And that's
7 not something we could live with.

8 We went back one more time and said
9 to them, if you are so certain, then just give us
10 the indemnification. And their attorneys would not
11 let them do it. Our opinion at that point was if
12 Susquehanna's attorneys, the people who are creating
13 the deal, would not indemnify us, then there must be
14 a incredibly strong possibility that this really was
15 possibly in the future to be deemed a fraudulent
16 transaction.

17 Q Who were the people at Susquehanna that
18 you were speaking to about this?

19 A Dan Werther.

20 Q Anyone else?

21 A Scott might have been involved, but I
22 don't know exactly.

23 Q You have no memory of discussions with him
24 about this?

25 A Scott most likely was involved in

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2 discussions in that he was in the room in many of
3 these discussions. I just can't say with definite
4 certainty that he was involved, but it was Dan
5 Werther who came back with the feedback from their
6 attorneys.

7 Q Who from Moses & Singer told you that this
8 could be a fraudulent conveyance? What's the name
9 of the lawyer?

10 A I apologize. I just read it a second ago.
11 The name just escapes me. Maybe we can go back to
12 that and I give you the name a little bit later
13 today.

14 Q Is it on these documents that were given
15 to me by your lawyer today?

16 A I am hoping so. Steven Glaser.

17 Q Tell me what exactly Mr. Glaser told you.

18 A Mr. Glaser had stated that the transaction
19 could and most likely would be deemed a fraudulent
20 transaction if we were unable to service the debt
21 and our creditors came after us. And as I stated
22 before, that historically -- and those may not be
23 his exact words -- but in the past the creditors
24 would have to go after the only people who would
25 have funds. And we would be the only people who at

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2 that point would have any money.

3 Q What was the financial condition of
4 Susquehanna at that time?

5 A Excellent, as far as we knew.

6 Q Was there any consideration given that if
7 these creditors made allegations relating to
8 fraudulent transfers that Susquehanna could be a
9 defendant, as well?

10 A No. We had asked them for the
11 indemnification, but -- no.

12 Q Did Mr. Glaser give you this opinion in
13 writing or oral or both?

14 A Mr. Glaser gave it verbally. And there
15 might have been a correspondence to Shay.

16 Q Do you remember any such correspondence?

17 A When I had gone through my notes, I didn't
18 see the correspondence. I know it was given
19 verbally.

20 Q When did Mr. Glaser tell you this?

21 A On or about the same time as ^^Shelly
22 Silverberg, because we went to Silverberg after we
23 spoke to Glaser. So you are probably looking at
24 June.

25 Q June?

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2 A Approximately.

3 Q So you were getting legal advice from your
4 lawyers in June of 2006 that the manner in which the
5 transaction was structured as of June created
6 exposure for fraudulent conveyance claims?

7 A It would be sometime in the period --
8 since I don't have the exact date, why don't we say
9 between June and July. In other words, between the
10 middle of June and the middle of July to be
11 specific, then the answer would be yes.

12 Q Any other lawyers at Moses & Singer who
13 provided this advice?

14 A At that point, no.

15 Q When did Susquehanna tell you that they
16 would not provide the indemnification that you were
17 looking for?

18 A I believe it would have been after this.
19 So you probably would have been looking at, I
20 believe, in August. It could be --

21 Q When in August?

22 A I don't know. It could be the end of July
23 or the beginning of August, but I don't have a date.

24 Q Who from Silverberg, Goldsmith advised you
25 that the contemplated transaction could be subject

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2 to fraudulent conveyance claims?

3 A It was Michael Goldsmith. And then Shelly
4 Silverberg had concurred with what Michael Goldsmith
5 had said. There were conversations with both.

6 Q When did those conversations take place?

7 A Again, I would tell you the middle --
8 somewhere between mid-June and mid-July.

9 Q What did Mr. Goldsmith say -- I am
10 assuming he told you?

11 A I was in the office -- as we produced just
12 recently, that there was some correspondence back
13 and forth.

14 Q Mr. Auerbach, did he tell you?

15 A Yes.

16 Q What did Mr. Goldsmith tell you about this
17 fraudulent conveyance?

18 A That the transaction could easily be
19 deemed a fraudulent conveyance.

20 Q Did he tell you why?

21 A Yes.

22 Q What did he say?

23 A Michael Goldsmith had looked into the
24 matter and based upon what Michael had looked into,
25 what research he had done, he felt -- he agreed that

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2 it could be construed as a fraudulent conveyance.

3 Q Did he tell you why?

4 A He concurred with Michael. I had spoken
5 to Michael Goldsmith about it previously.

6 Q Mr. Auerbach, did Mr. Goldsmith share with
7 you his rationale for his conclusion?

8 A That he agreed with what Mr. Michael
9 Goldsmith had stated, yes.

10 Q I am asking you about Mr. Goldsmith.

11 (Record read back.)

12 A Mr. Goldsmith felt, again, that with the
13 amount of debt that the company was going to incur,
14 if anything was to go wrong with the company, if the
15 company for any reason couldn't function going
16 forward in any way and if the company was unable to
17 go forward, that it would be the Auerbachs, Shay
18 and Ross, that would be held responsible by the
19 creditors.

20 In addition to that, the other issues
21 were, is that with the debt that was proposed to go
22 on to the company, that the company would need far
23 more operating capital than stated by Susquehanna to
24 run the business, because Susquehanna's model did
25 not take into account the additional credit demands

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2 that the debt would have put on the company outside
3 of the simple servicing of the debt, as Susquehanna
4 had a difficult time approaching how they were going
5 to determine what that debt load would be. Which we
6 anticipated to be somewhere between -- probably
7 somewhere between \$4 to \$6 million.

8 MR. ZIMMERMAN: Ross, please listen to the
9 questions that are being asked and answer the
10 questions.

11 THE WITNESS: Okay.

12 Q Who were the entities that were the
13 creditors that possibly could have brought these
14 claims?

15 A The creditors would have been anyone that
16 we were purchasing materials from. The creditors
17 could have been CIT.

18 Q Did anyone ask CIT what their view was
19 about the possibility of a fraudulent conveyance
20 plan?

21 A I do not remember if we did.

22 Q Well, if in fact CIT was not asked, do you
23 know why?

24 MR. ZIMMERMAN: Objection.

25 A No.

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2 Q CIT was prepared to loan, I think, close
3 to \$20 million, right?

4 A Yes.

5 Q And the concern was that there could be a
6 fraudulent conveyance claim in the event that the
7 company couldn't service the debt and repay CIT,
8 correct?

9 A Yes.

10 Q Did anyone ask CIT whether they had any
11 concerns about whether or not this transaction was a
12 fraudulent conveyance?

13 A CIT is one member. CIT also has a lead on
14 the inventory. CIT has first position on
15 everything. If something were to happen to the
16 Northwest Company, the one entity that has the very
17 best chance of remaining ^^^hold/whole would be CIT.

18 Q So the concern about fraudulent conveyance
19 really wasn't with respect to CIT?

20 A It's somewhat related to CIT. It's not
21 the major issue.

22 Q What was the major issue?

23 A The major issue would be suppliers and
24 licensors.

25 Q And as of the date of the proposed

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2 transaction -- let's just say September of '06 --
3 how many suppliers were owed money for company
4 payables beyond 30 days?

5 A From our company?

6 Q Yes.

7 A I don't know.

8 Q Were any?

9 A I have no idea. I am sure somebody was.

10 Q Was the company in default with respect to
11 any obligations at that time?

12 A No.

13 Q So the concern about a fraudulent
14 conveyance was that prospective vendors who would
15 supply goods or material to the company may not get
16 paid and, therefore, they would be able to somehow
17 bring a claim against you or your father?

18 MR. ZIMMERMAN: Objection.

19 A Vendors. Licensors. Anyone that
20 Northwest owed money to if we had gone into
21 bankruptcy.

22 Q Let's talk about the licensors. Which
23 licensors were you concerned about?

24 A All.

25 Q How many were there at that time?

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2 A Between 30 and 40.

3 Q What was the potential exposure with the
4 licensors?

5 A Millions.

6 Q How many millions?

7 A I don't know. Many millions.

8 Q Did you ever do the calculation?

9 A At the time, we looked at it briefly. If
10 you want me to give you a minimum threshold, you
11 were looking at \$10 million -- \$7 to \$10 million.

12 Q Let's talk about Disney. What were the
13 termination provisions that were contained in the
14 license agreement, do you know?

15 A When you say "termination," in what way
16 termination?

17 Q If you wanted to terminate the license
18 with Disney, did the licensee have a right to do it?

19 A Did the licensee have a right to
20 terminate?

21 Q Yes.

22 A I do not believe so.

23 Q Did the licensor have a right to do it?

24 A Yes.

25 Q When was the last time that you looked at

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2 the license agreements?

3 A For Disney?

4 Q Yes.

5 MR. ZIMMERMAN: Objection. Just to be
6 clear, the current one? The existing license?
7 The license that might be in place at the time
8 of the discussions? I am just trying to make
9 sure everybody is talking about the right
10 issue.

11 Q When was the last time that you looked at
12 any license agreement relating to Disney?

13 A The last license agreement I looked at
14 related to Disney was the extension -- our latest
15 extension.

16 Q When was that that you looked at it?

17 A Six months ago.

18 Q Now, do you know if the lawyers from Moses
19 & Singer or from Goldsmith reviewed the license
20 agreements -- these 30 or 40 license agreements in
21 connection with their fraudulent conveyance
22 analysis?

23 A No.

24 Q They didn't?

25 A No, they didn't.

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2 Q And as you sit here today -- are the
3 license agreements different?

4 A You mean, are all the terms and conditions
5 different?

6 Q Yes.

7 A Some of the terms and conditions are
8 different.

9 Q Are there any in which the licensee is
10 permitted to terminate the agreement, for example,
11 on 30 days' notice?

12 A Quite possibly could.

13 Q How many?

14 A I don't know. And if we terminate, I
15 would believe that we would owe the royalties. I am
16 not aware of any provision in any license we have, I
17 am not aware of any agreement that allows the
18 licensee, not the licensor, but the licensee to
19 terminate without paying its obligation.

20 Q Is that sort of a best guess that we are
21 getting at here?

22 MR. ZIMMERMAN: Objection.

23 A In all of the licenses I have read from
24 the companies in which we license, there are
25 provisions in the license that give the licensors

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2 the ability to cancel -- to terminate under certain
3 conditions the license agreements with the company.

4 I have never in my belief read a
5 clause that allows them to terminate and give up
6 their rights to collect all monies due within the
7 term of the agreement. I have read a few contracts
8 where the licensee has the ability to get out of the
9 contract, but I have never -- again, I do not
10 remember or recall ever reading where the licensee
11 can terminate and walk away from its financial
12 obligations in the contract. That's my belief.

13 Q Now, the vendors. Who were your largest
14 vendors in, say, September of 2006?

15 A Itochu. The largest vendors would be
16 Itochu, 1888 Mills, would be our largest.

17 Q What did Itochu do? What did it supply to
18 the company?

19 A Textile products, products we sold.

20 Q What were the terms and conditions under
21 which you did business?

22 MR. ZIMMERMAN: Objection.

23 A Net 60 days LDP.

24 Q Were there any alleged credit in place?

25 A No.

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2 Q And 1888 Mills?

3 A Same terms.

4 Q Are they also a textile producer?

5 A Yes, they are.

6 MR. SMITH: Let me just state, I am going
7 to, at the lunch break -- just so you are not
8 surprised, now that the decision has been made
9 about the attorney/client waiver here -- we are
10 going to ask to take Glaser's deposition. And
11 I think we already have Sheldon lined up, but
12 we may want to run through Goldsmith, too,
13 since apparently he is the initial opiner.

14 I am assuming you will take a subpoena on
15 behalf of your partner?

16 MR. ZIMMERMAN: Yes.

17 MR. SMITH: Can I serve Goldsmith through
18 you, too?

19 MR. ZIMMERMAN: I'm not authorized on his
20 behalf to accept anything.

21 MR. SMITH: We will mark as the next
22 Exhibit, which will be Exhibit 12, a document
23 that you received from Mr. Beer.

24 For the record, this is an e-mail dated
25 January 14, 2005 from Mr. Beer with an